

Paul Williams
Sydney

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Review of External Dispute
Resolution and Consumer Scheme

Dear Panel members,

My name is Paul Williams.

I am an individual consumer who has previously made submissions on EDR to the ASIC review of the FOS terms of reference, the 2013 Independent review of FOS and Financial Systems Review.

My previous submissions on EDR:

In 2009, I made a submission on the FOS terms of reference concerning the deletion of the indexation of monetary limits that were due to occur in 2010. My submission was recorded in *ASIC Report 182: Feedback on the new FOS's TOR* (see appendix 1) and resulted in FOS agreeing to restore the promised 2010 indexation of the monthly income stream cap.

Unfortunately, FOS avoided applying the same indexation to the lump sum cap which remained at \$280,000 for almost a decade.

The income stream cap that was correctly indexed, increased by 38% from \$6,000 to \$8,300. During the same time period, the lump sum cap increased by less than 10%. It was finally increased to \$306,000 in 2015, but should be \$386,000. This missed indexation has reduced the lump sum cap by around \$80,000. (see my response to Discussion Question 20).

I unsuccessfully raised this issue in submissions to the 2013 Independent Review of FOS and the Financial Systems Review.

Response to Discussion Questions

Discussion Question 46: *Are there any particular features of other schemes or approaches that would improve user outcomes from EDR and complaints arrangements in the financial system?*

The UK FOS has a position known as the Independent Assessor that would close a major gap in the oversight of the Australian FOS.

This gap exists as both ASIC and the FOS board deliberately avoid observation and intervention in the individual cases at FOS. The issue papers states, “ASIC’s oversight role is limited to high level policy settings. ASIC does not intervene in the decision making process of the scheme” (paragraph 23) and “The FOS Board does not become involved in the detail of cases which come before the scheme as that would prejudice decision-makers’ independence” (paragraph 55).

Independent Assessor of the UK FOS

The UK FOS has a permanent Independent Assessor who decides whether or not the British ombudsman service has treated their customers fairly while carrying out the investigation into a case.

The Independent Assessor examines only the practical handling of cases and does not consider or comment on merit decisions.

The current UK Independent Assessor is Amerdeep Somal and her website is www.independent-assessor.org.uk.

While the UK Independent Assessor is appointed by the UK FOS Board, she is not part of UK FOS and is not accountable to the UK FOS chief executive and the chief UK ombudsman.

She states, “I’m free from influence, guidance and control by the ombudsman service and the Board in respect of reviews, opinions and recommendations although my work is limited by terms of reference set by the board.”

In the year to March 2016, the Independent Assessor found about 200 critical cases where there were serious service failings or the service failed to follow its processes.

The Independent Assessor can intervene to stop a case while she investigates. She did this 8 times in the last year. By this means she can protect procedural fairness in real time.

In her latest annual report, she stated, *“Customers felt they should be able to see and comment on everything the business had provided. However there were instances where the information requested should have been identified and actioned sooner.”*

The UK Independent Assessor makes recommendations to the chief ombudsman that can include compensation to the consumer for UK FOS’s errors. If the Chief UK ombudsman disagrees with the recommendation it is sent to the UK FOS Board for its consideration. If the UK FOS board disagrees with the Independent Assessor, she publishes and comments on the rejected recommendations in her annual report which is part of the UK FOS’s annual report.

In contrast, without an Independent Assessor the Australian system appears very opaque. The Australian FOS board refuses to investigate the complaints it receives about the FOS service. Instead the Chairman of the Australian FOS board passes the complaint to the chief Australian FOS ombudsman, who out of courtesy, reports back to the Chairman of the Australian FOS board in a non-transparent manner.

An Australian Independent Assessor could be appointed by either ASIC or the Minister for Revenue and Financial Services.

An Australian Independent Assessor would ensure procedural fairness and improve the transparency of any financial dispute resolution organisation. The Independent Assessor is equally needed at an Industry-based EDR company, a statutory body or a financial tribunal.

The annual report of the Independent Assessor within the FOS annual report would allow consumers to see that fairness has been done.

Discussion Question 27: How are the existing EDR schemes and complaints arrangements held to account? Could this be improved?

It appears that they are only held to account by parliamentary committees, and the periodic independent reviews.

The introduction of an Australian Independent Assessor (see discussion question 46) would hold the EDR schemes to account on their practical service.

Improvements in the periodic independent review:

1. The periodic independent reviews are currently scheduled to occur every 5 years. This is too infrequent and needs to change to every three years.

2. ASIC needs to ensure the periodic independent review occur on time.

ASIC allowed FOS to delay the first independent review by over two years. The first independent review was due for completion on 1 July 2011 (paragraph 28 in ASIC report 182: *Feedback from submissions to FOS's new terms of reference*) but did not get under way until late 2013 and did not report until early 2014.

3. The periodic independent reviewers need to be high calibre and high profile.

4. The appointment of the periodic independent reviewers and the determination of the terms of reference needs to be taken away from ASIC and the FOS board.

I submit that the Minister for Revenue and Financial services after consultation with FOS board, ASIC, chief ombudsman and the Australian Independent Assessor should directly appoint the periodic independent reviewer and directly decide the Terms of Reference.

5. There should be a change in how the periodic independent reviewer's recommendations are accepted and implemented by the FOS board.

I submit that the Minister for Revenue and Financial services should closely monitor ASIC's consultations with the FOS board on their response to the independent review's recommendations and ensure the timetable is implemented for the accepted recommendations.

6. If the EDR firms are converted to statutory bodies then the periodic independent reviewer can report directly to the Minister who would then directly decide which recommendations to accept and decide the timetable of adoption.

7. The periodic independent review should be more robust in its examination of the fairness of the merit of decisions.

The 2015 Treasury paper, *Key Practices for Industry based Customer Dispute Resolution* suggests at 6.15 (d) that the periodic independent review includes “*assessing whether the dispute resolution process used by the office are just and reasonable.*”

The periodic independent reviewer needs to personally conduct a random audit of cases and ensure it reaches a statistically valid sample size.

The reviewer also needs to check the process the office uses to “*review decisions and determinations for consistency and compliance, such as selective sampling and auditing of cases.*” (Key benchmark: Fairness 3.13)”

Discussion Question 20: Are the current monetary limits for determining jurisdiction fit-for-purpose? If not, what should be the new monetary limit? Is there any rationale for the monetary limit to vary between products?

The monetary limits are not fit-for-purpose.

- Jurisdictional limit of \$500,000.

The jurisdictional limit of \$500,000 is based on the retail client limit that was introduced into the Corporations Act in 2002.

In the 2010, the Treasury Department issued an options paper, *Retail and Wholesale clients* and acknowledged at footnote 3 that “*The \$500,000 threshold was effectively a carryover from the same figure adopted as the point of exclusion of prospectus requirements in 1991.*”

The Treasury department option paper highlighted the dwindling value of the retail client limit by stating, “*The level of \$500,000 is a level now*

within reach of an increasing number of Australians, given that in June 2010 the median value of a house in Australia was \$558,540.”

Applying Male Total Average Weekly Earnings (MTAWE) to \$500,000 from 1994 (the earliest year in the current series) increases the jurisdictional limit to around \$1,200,000 in today's dollars (see appendix 2).

Recently it was decided that the upper limit for superannuation in pension phase for an individual would be \$1.6 million. While there would be few couples with \$3.2 million in pension funds, I suspect that there would be a substantial number with a combined total of \$2 million in their SMSF.

I submit it is fairer to have a \$2 million limit and this also matches the proposed \$2 million for small business.

- Lump sum cap

FOS avoided indexing the lump sum cap in 2010.

The monthly income stream limit which was correctly indexed, went from \$6000 in 2007 to \$8,300 in 2015. This is a 38% increase and if this indexation was applied to the lump sum cap it would be \$386,000 instead of \$306,000.

A lump sum cap of \$386,000 is 77% of the current jurisdictional limit of \$500,000. Apply the same proportion to a jurisdictional limit of \$2 million, gives a lump sum of around \$1,500,000.

I submit the lump sum cap should be \$1,500,000.

Income stream cap

The monthly income stream cap should be increased to \$15,000 a month to match the threshold of the top tax bracket. To be fair, the income stream cap should provide coverage up to the start of the top tax bracket.

Discussion Question 37: *Should it be left for industry to determine the number and form of the financial services ombudsman schemes?*

No.

Discussion Question 38: Is integration of the existing arrangements desirable? What would be the merits and limitations of further integration?

I think FOS and ICO should be merged into one statutory ombudsman. Due to the substantial differences of structure and governance, the SCT should not be merged with the other two bodies.

Discussion Question 39 and 40: *How could a 'one-stop shop' most effectively deal with the unique features of the different sectors and products of the financial system (for example, compulsory superannuation)?*

What form should a 'one stop shop' take?

A 'one stop shop' should be formed as a statutory body with a single statutory ombudsman in one division and the SCT division in another division.

Discussion Question 41: *If a 'one -stop shop' in the form of a new single dispute resolution body were desirable should it be....*

The jurisdictional limits should be \$2m for both individuals and small business. The lump sum cap should be \$1,500,000 and the income stream cap \$15,000 a month.

The funding should remain the same for the each of the two divisions.

Discussion Question 42: *Would the introduction of an additional forum, in the form of a tribunal, improve user outcomes?*

It would add great value, if the ombudsman system could be perfectly preserved and the tribunal seamlessly integrated above the existing ombudsman to deal with cases beyond the ombudsman's lump sum claim limit.

Discussion Question 43: *If a tribunal were desirable.....*

It should complement existing EDR and complaints arrangements.

It should be less like a court (judicial powers, compulsory jurisdiction, adversarial processes and legal representation) and more like current EDR schemes (relatively more flexible, informal decision-making and processes)

The jurisdiction of the tribunal should be the same as FOS's current jurisdiction but with higher caps.

The jurisdiction should be small business disputes, banking disputes and life insurance disputes.

The tribunal could handle claims beyond the ombudsman lump sum cap which should be increased to \$386,000.

I submit that the jurisdictional limit should be \$2m and a lump sum cap at the tribunal should be \$1,500,000.

The decisions should only be binding on the financial service provider.

The ombudsman component of the 'one stop shop' must remain free and completely funded by industry.

The tribunal should be largely industry funded with low cost tribunal filing fees.

The tribunal should have a general division and an appeals division.

The initial filing fee for the tribunal should be around \$70 which is in line with the state based "one stop shops".

There should be an appeals division of the tribunal that can also handle appeals made against the ombudsman's division. The appeals division could be slightly more court-like and should have a filing fee of around \$350.

Consumers should be able to provide their own legal representatives at all levels but it should only be considered desirable in the appeals division.

I wish to thank the panel for the opportunity to make these submissions to the review and look forward seeing your interim findings.

Appendix 1:

ASIC report 182: *Feedback from submissions to FOS's new Terms of Reference (paragraphs 95 to 105).*

"We received a written submission from an individual consumer who expressed concern that the \$6,000 life insurance policy monthly income stream cap would remain until 2015 despite paragraph 58, of the 1 July 2008 FICS Rules stating that FICS will index its \$6,000 life insurance monthly income stream amount by the increase in CPI every 3 years from 1 July 2010.

We note that paragraph 58 of the 1 July 2008 FICS Rules was developed after extensive stakeholder consultation when FICS released a consultation paper on Review of the FICS Monetary Limits in May 2007. At the time, FICS noted that if the \$6,000 monthly limit was adjusted for the increase in CPI, it would be \$6,750 per month on 31 March 2007 and \$7,000 on 30 June 2008.

FOS has agreed to update the TOR on which we consulted, at Item 1 of both Schedules 1 and 2 to reflect this indexation, so the life insurance policy monthly income stream cap will be

- *\$6,700 from 1 January 2010 (at Item 1, Schedule 1)*

and

- *\$7,500 from 1 January 2012 (at Item 1, Schedule 2)"*

Appendix 2:

MWATE (series A850021467) was 669.2 in November 1994 (earliest date in the current series) and is 1613.6 in May 2016. So \$500,000 indexed by MWATE from 1994 to 2016 is worth \$1,205,618 in today's dollars.